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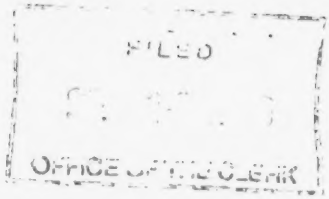

IN THE

Supreme Court of the United States

WILLIAM HAROLD KELLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Supreme Court

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

If this Court denies certiorari, the State of Florida will execute petitioner Billy Kelley. There is every reason to fear that he will go to his death an innocent man, framed by the testimony of the admitted mastermind of the killing given in exchange for amnesty, and mistakenly convicted as a result of the State's undisputed suppression of the evidence at issue in the petition.

The circumstances of this case give rise to a substantial claim under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which Kelley immediately pursued. But the Florida Supreme Court excused the State's serious misconduct on the ground that "the evidence disposition forms at issue are neither favorable nor material" because they contained no direct evidence of Kelley's innocence. Pet. App. 17a-18a. As the petition explained, that narrowly circumscribed interpretation of the *Brady* materiality inquiry is insupportable. The State's attempts to recharacterize the ruling below are unpersuasive. Its suggestion that Kelley's *Brady* claim would fail for other reasons is irrelevant at this stage of the proceeding (because they were not the basis of the ruling below), substantively wrong, and rests on a significant misstatement of fact that the State has withdrawn subsequent to filing its opposition.

The petition for certiorari should be granted, the Florida Supreme Court's *Brady* ruling reversed, and the case remanded for further proceedings.

1. The petition demonstrated that the Florida Supreme Court improperly narrowed the *Brady* materiality inquiry and considered only whether the forms directly proved Kelley's innocence. The State does not dispute that it suppressed the evidence disposition forms. It furthermore agrees that under this Court's precedents the determination whether it was required to disclose the forms includes an assessment whether they would have led Kelley's counsel to secure other material evidence. *See* BIO 15, 17; Pet. 18-21. It is thus common

ground that, if petitioner's reading of the ruling below is correct, the Florida Supreme Court's decision squarely conflicts with this Court's precedents and decisions of several circuits. Certiorari would plainly be warranted.

The State's answer is that "the Florida Supreme Court did exactly what Kelley claims it should have done." BIO 16. That is not correct. The petition set forth the court's analysis of his *Brady* claim (at 14-15), and we reproduce it in its entirety once again here:

> Here, an evidentiary hearing on Kelley's *Brady* claim was not warranted because the record conclusively demonstrates that Kelley is not entitled to relief. Specifically, the record demonstrates that the evidence disposition forms at issue are neither favorable nor material. *These forms memorialize the transfer of evidence from the Florida Sheriff's Bureau to local officials after laboratory testing. They do not exculpate or exonerate Kelley; the forms do not mention Kelley or implicate someone else. Likewise, they do not offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses.* Furthermore, there is not a reasonable probability that, had the evidence disposition forms been disclosed, the result of the proceedings would have been different. Our confidence in the outcome is not undermined. Accordingly, because the evidence disposition forms are not favorable to Kelley and because the State's failure to disclose them did not prejudice Kelley, no *Brady* violation occurred.

Pet. App. 17a-18a (emphasis added).

This language could not be clearer. The Florida Supreme Court strictly limited its assessment to the effect that the forms themselves would have had on the jury. The court's analysis leaves no room for considering the crime

scene evidence itself, which was reflected on the forms and which Kelley's counsel certainly would have pursued if they had known that it was not included within the materials authorized to be destroyed by the court order.

The State almost entirely ignores the Florida Supreme Court's discussion of petitioner's *Brady* claim. The only discussion approaching a response is the State's passing mention in a single sentence of the fact that the "court specifically observed that its confidence in the outcome had not been undermined, and that there was no reasonable probability of a different result, had the forms been disclosed prior to trial." BIO 16-17. But those statements cannot be ripped from their context. The full paragraph explains *why* the Florida Supreme Court retained its confidence in the outcome of the trial: it believed that the forms themselves would not have changed the outcome, which was the only inquiry it deemed to be relevant and undertook.

If the court had instead deemed relevant the effect of the evidence contained in the forms, it surely would have mentioned that evidence. It strains credulity to believe that the court detailed why the forms were not material by their terms, then implicitly – and without any discussion – rejected the far more substantial claim that Kelley's counsel would have located the non-Sweet crime scene evidence and put it before the jury.

The State's principal argument is instead that other language in the opinion below demonstrates that the court undertook a broader materiality inquiry. But the entirety of the court's analysis is set forth in the preceding block quote. The short excerpt quoted by the State in its opposition (at 16) relates to a *different* claim by Kelley relating to *different* evidence. As described at length in the petition (at 8-10), Kelley previously litigated and lost in the state courts the claim that the prosecution violated his right to due process when it destroyed the evidence relating to the case. That claim related to both the Sweet trial evidence (which was

destroyed) and the non-Sweet crime scene evidence (which petitioner was told *after* those claims were litigated had instead *actually* been returned to the investigating authorities).

In the opinion now under review, the Florida Supreme Court returned to that destruction of evidence claim in the language that the State excerpts (which we reproduce in full, setting out in double brackets the limited language quoted by the State):

> To the extent Kelley is seeking to use the evidence disposition forms to relitigate his prior claims regarding the destroyed evidence, he is procedurally barred from doing so. As this Court determined on direct appeal and in the appeal of the first postconviction motion, the destruction of evidence did not prejudice Kelley's case. *Kelley*, 486 So. 2d at 582; *Kelley*, 569 So. 2d at 756. Moreover, when affirming the denial of Kelley's postconviction DNA testing motion, this Court explained that the "*evidence collected in the Sweet trials was destroyed by court order in 1976* . . . . As testified to by the nine witnesses, none of the requested items were located despite a diligent search." *Kelley*, 974 So. 2d at 1051. Thus, [[we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover *evidence that was destroyed by court order in 1976* and could not be located despite a diligent search.]]

Pet. App. 18a (emphasis added) (capitalization omitted) (double brackets reflect language quoted at BIO 16).

The State contends that the language it has quoted rejects Kelley's *Brady* claim on the ground that the evidence cited in the forms was "destroyed by court order in 1976." It asserts that "[c]learly, as the opinion expressly indicates, the Florida

court did not limit its analysis to the value of the forms themselves, but considered the effect that disclosure of the forms might have had on preparation of the defense." BIO 16.

But that is doubly wrong. First, the language quoted by the State is wholly unrelated to petitioner's *Brady* claim. Instead, having concluded the analysis under *Brady*, which was strictly limited to the forms, the court explained that the evidence disposition claims do not alter its prior rejection of Kelley's claim that the State had violated due process by "destroy[ing] evidence." Second, as is plain from the language that the State omits from its quotation, the destroyed evidence in question was only the "evidence collected in the Sweet trials," which "was destroyed by court order in 1976," rather than the distinct and far more extensive non-Sweet crime scene evidence.

Given the foregoing, the Florida Supreme Court's decision conflicts with bedrock principles under *Brady v. Maryland* as articulated by this Court and other circuits. Whatever the value of the forms if put directly before the jury, the State's failure to disclose them caused the defense to "abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985). *See* Pet. 19-22 (collecting Supreme Court and federal appellate precedents). The judgment accordingly should be vacated and the case remanded for the Florida Supreme Court to conduct a proper analysis under *Brady*.[1]

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[1] As the petition explained, granting review in this case would also have the collateral benefit of almost surely resolving the well-recognized conflict over whether evidence may be material if it would not itself be admissible at trial. If petitioner is correct that evidence is subject to *Brady* if it will lead the defense to other material avenues of inquiry, then the

2. The remaining arguments in the opposition present no basis for denying review.

Petitioner recognizes that the state trial court stated that the non-Sweet trial evidence was destroyed prior to Kelley's trial (Pet. App. 8a), although it manifestly was not a "finding" (*contra* BIO 20). When petitioner's counsel reiterated to the trial court that there was no evidence of that fact in a petition for rehearing, the trial court did not disagree. Instead, it concluded that "the status of th[is] physical evidence in 1984 [when Kelley was tried] has no bearing on the claim." Pet. App. 12a.

The State nonetheless asserts that an "extensive record" supports that conclusion. BIO 20. This Court need not be drawn into that factual dispute, however. The Florida Supreme Court did not rest its decision on that basis. On remand, it is free to consider that question. The Florida Supreme Court's decision instead rested on its narrow conception of the *Brady* materiality inquiry, which this Court should grant certiorari to review.

On remand from this Court, the Florida Supreme Court will surely refuse to dismiss Kelley's *Brady* claim on the basis of the State's assertion that the record shows that the non-Sweet crime scene evidence was destroyed prior to his trial. There has never been a proceeding in which proof on that issue could be developed or presented. The trial court did not dispute that "there has never been an evidentiary finding that [these] items of physical evidence were actually destroyed prior to trial." Pet. App. 2a-3a. It nonetheless summarily dismissed petitioner's *Brady* claim. The Florida Supreme Court, in turn, concluded that "an evidentiary hearing on Kelley's *Brady* claim was not warranted," because

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admissibility *vel non* of that evidence is logically irrelevant. *See* Pet. 22-25.

the claim failed as a matter of law under its narrow materiality standard Pet. App. 17a.[2]

Nor could Kelley otherwise be fairly required to prove, in the absence of an evidentiary hearing, that the non-Sweet crime scene evidence still existed at the time of his trial. The State concededly told Kelley's lawyers prior to trial that it had no *Brady* material to disclose, but then brazenly suppressed the disposition forms. The evidence to which the forms referred was in the *State's* possession. A defendant in Kelley's position has no way to prove what the State did with the evidence without authority from a court to pursue the claim. But as noted, petitioner was never permitted to either develop or present the basis for his claim that the evidence remained available at the time of his trial, and was only later destroyed by the State.

There furthermore is no reason to infer that the non-Sweet crime scene evidence was destroyed pursuant to the 1976 destruction order. That order was not only expressly limited to the crime scene evidence admitted at trial, but also applied solely to evidence within the court's own files. As the opposition admits (at 6): "the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials." The non-Sweet crime scene evidence, by contrast, was neither admitted at trial nor ever within the court's control, as it had been returned to the investigating authorities. That evidence could be destroyed only through a court's authorization. The presumption under state law is therefore that the evidence was retained. *Robinson v. State*, 325 So. 2d 427, 429 (Fla. 1st DCA 1976).

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[2] The State's assertion that Kelley "has no evidence [to the] contrary" (BIO 20) is thus simply disingenuous. Kelley has been denied any opportunity to develop or present that evidence.

Other rulings by the state courts also refute the State's contention that the non-Sweet crime scene evidence was destroyed prior to Kelley's trial. The State post-conviction court rejected petitioner's request that he be provided with DNA testing of this evidence. It reasoned that the evidence could not be located in 2006. *See Kelley v. State*, 974 So. 2d 1047, 1051 (Fla. 2007). The Florida Supreme Court reiterated that finding in its most recent opinion below. *See* Pet. App. 18a (discussing evidence that "could not be located despite a diligent search"). If the Florida courts actually believed that the non-Sweet crime scene evidence had been destroyed pursuant to the Sweet trial court's order, they would have had no reason to require a search for the evidence thirty years later and describe it as not locatable.

The State notably provides no record citation for its bald claim that there is an evidentiary basis for concluding that the non-Sweet crime scene evidence was destroyed prior to Kelley's trial. This Court can be certain that, if the State had any factual support for that critical assertion, it would have provided that support. But to resolve any doubt, we have appended to this brief the excerpts from the State's trial court and state supreme court briefs on this question. In those briefs, the State cited *only* the fact that "Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence has been destroyed prior to trial." App., *infra*. But that assertion ignores the fact that, at the time Kelley's lawyers made that representation, they (i) had been *told that by the State*, and (ii) believed those representations *because they had not been provided the forms*. Kelley's attorney subsequently submitted a sworn affidavit in the Florida courts (also reproduced in the appendix), which the State ignores, saying precisely this. App., *infra*.

Ultimately, as noted at the outset, this factual question is not before this Court, because it (understandably) was not the basis for the Florida Supreme Court's decision, which instead

rejected petitioner's *Brady* claim as a matter of law. On remand, the State is free to press its flawed claim that the non-Sweet crime scene evidence was in fact destroyed prior to Kelley's trial.

3. The State's only remaining argument is that, even if Kelley had secured the evidence identified in the disposition forms, "no different outcome is possible, let alone probable." BIO 20. Again, the Florida Supreme Court did not decide the case on this basis. Nor is it a substantial claim, as illustrated by the fact that in two separate rounds of litigation the State did not even *dispute* that the evidence was material. *See* Pet. 6, 7. In fact, there is every reason to believe that the evidence would have made a significant difference. The only substantial evidence against Kelley came from Sweet, the acknowledged mastermind of the crime who testified in exchange for immunity. Though the State notes that "evidence was presented to corroborate Sweet's testimony as to Maxcy's murder, including bank records, phone records, car rental and hotel records" (BIO 6), that evidence showed *Sweet*'s guilt. The evidence against *Kelley* came from Sweet's wholly self-interested mouth. As the Florida Supreme Court explained: "It was this testimony upon which [Kelley's] indictment and prosecution in this case were centrally based." *Kelley v. State*, 486 So. 2d 578, 580 (Fla. 1986). The jury was duly doubtful and hung not just once (producing a mistrial), but twice. The second deadlock was broken only by an improper instruction that no further evidence existed.

The State asserts that "the jury was well aware" of the arguments that Kelley would have made on the basis of the non-Sweet crime scene evidence. BIO 20. But there is a dramatic difference between the effect of the arguments of counsel and the physical evidence of the crime, particularly in a capital case as close as this one. At the very least, the evidence would have shown a violent and bloody murder, but absolutely no blood in the car that Kelley supposedly drove

away immediately thereafter. The tangible hair and fingernail scrapings, with no match to Kelley, would have brought home to the jury that there was no physical evidence of Kelley's guilt, and that the State's case rested entirely on the claims of the true killer, who was seeking only to save himself.

Finally, respondent's Statement of the Case (at 1-2) suggests that Kelley's trial counsel should have known from the Sweet trial transcript that the non-Sweet crime scene evidence had been returned to the investigating authorities. That is demonstrably false. In response to an inquiry from Kelley's counsel, the State has now confirmed that "the testimony in the Sweet transcript relates specifically to the exhibits that were admitted at that trial" and that it "did not intend to suggest that that the Sweet trial transcript contained testimony specifically regarding the non-Sweet exhibits." Ltr. from Carol Dittmar to Joseph Lang (Sept. 29, 2009).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 2009

APPENDIX

APPENDIX

STATE OF MASSACHUSETTS,

COUNTY OF SUFFOLK.

IN RE: WILLIAM H. KELLEY

AFFIDAVIT OF BARRY P. WILSON

1. My name is Barry P. Wilson. I am an attorney presently residing in Massachusetts. I am over 21 years of age.

2. I was counsel of record for William Kelley in his 1987 Florida Rule of Criminal Procedure 3.850 Motion for Post-Conviction Relief and in his appeal of the denial of same to the Florida Supreme Court. I represented Mr. Kelley up until the time of the filing of his federal habeas petition in 1992.

3. During my representation of Mr. Kelley, I became familiar with an issue relating to the destruction of certain evidence by court order. In that regard, I prepared affidavits for two attorneys who previously represented Mr. Kelley, William Kunstler and Jack Edmund. In each affidavit I wrote: "At some point during Mr. Kelley's trial it became clear that evidence had been destroyed, as well as the fruits of the police investigation."

4. In the reply brief I prepared in the appeal of the denial of Mr. Kelley's Rule 3.850 Motion for Post-Conviction Relief, I wrote: "It appears that at some point in Mr. Kelley's trial counsel became aware that the fruits of the police investigation had been destroyed."

5. I understand that my statements were subsequently interpreted to mean that every bit of evidence in the case had been destroyed. Kunstler, Edmund, and I would not have personal knowledge that all the evidence was destroyed. We knew only what we were told (or not told) by

the prosecution. Although prepared in good faith and to the best of my knowledge at the time, the affidavits and reply brief were mistaken to the extent they indicated personal knowledge that all fruits of the crime scene investigation were destroyed prior to Mr. Kelley's 1984 trial.

6. There were only six pieces of physical evidence introduced at the trial of John Sweet, (1) one bullet; (2) one tire; (3) one bed sheet; (4) a small section of the victim's shirt; and (5, 6) two handwritten notes by John Sweet. That is the only physical evidence the prosecution disclosed to the defense. The other approximately 40 pieces of physical evidence from the crime scene were never disclosed to the defense, nor was the trial judge notified of any evidence other than the six pieces destroyed by Court Order from the Sweet trial. At no time during Mr. Kelley's two trials did the prosecution ever disclose any information concerning the other pieces of evidence.

7. Throughout the briefs prepared on Mr. Kelley's appeals and various motions, I have argued the following, "Other evidence that was presumed destroyed and cannot be accounted for"; "No one discussed missing evidence"; "The destroyed, misplaced and unaccounted for evidence"; "Neither the trial court nor the Florida Supreme Court were fully apprised of the extent and nature of the evidence destroyed or lost, or simply never provided to the defense"; "The State never apprised the defense of missing crime scene evidence and there exists additional relevant evidence not accounted for by the order of destruction entered by the Sweet trial judge. This evidence is comprised of the fruits of the FDLE investigation of the actual crime scene." I made these arguments because I did not know what happened to any of the other pieces of missing evidence.

8. I apologize if the affidavits I drafted for Kunstler and Edmund, and my representations in the reply brief I prepared, misled the court to understand that all the fruits of the crime scene investigation had been destroyed.

Again, we had no personal knowledge that all the evidence was destroyed. We knew only what we were told (or not told) by the prosecution. It is my belief that, if Prosecutor Hardy Pickard had been candid about this missing evidence, none of this confusion would have occurred.

9. It is my personal belief that an innocent man has been on death row for 25 years because the prosecution withheld information about the other fruits of the crime scene investigation that were not introduced in Mr. Sweet's trial, and because that evidence would have shown that the State's one key witness (Mr. Sweet) was lying.

Signed under the penalties of perjury this 4th day of June 2008.

_____

Barry P. Wilson

Kelley v. State, Case No. SC08-608

(excerpt from Answer Brief of Appellee (at 23-24):

In addition, Kelley's unsupported speculation that disclosure of these forms would have resulted in access to the crime scene evidence itself is conclusively refuted by the record in this case. Both of Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence had been destroyed prior to trial (PC 354, 366-67). Although Kelley contends that this testimony was based on "incomplete information" because counsel did not have these disposition forms, as previously noted, forms showing the evidence existed in 1967 does not undermine direct testimony that the evidence was destroyed prior to 1984.

Kelley v. State, Case No. CR81-0535
(Fla. 10th Cir. Ct.)
(Excerpt from States' Response to Successive Motion for Postconviction Relief (at 18-19)):

In addition, Kelley's unsupported speculation that disclosure of these forms would have resulted in access to the crime scene evidence itself is conclusively refuted by the record in this case. Both of Kelley's trial attorneys provided sworn testimony at the postconviction evidentiary hearing that the crime scene evidence had been destroyed prior to trial (Kelley PC 354, 366-67). Although Kelley contends that this testimony was based on "incomplete information" because counsel did not have these disposition forms (Motion, p. 7), as previously noted, forms showing the evidence existed in 1967 does not undermine direct testimony that the evidence was destroyed prior to 1984. In fact, Kelley has no way to prove what information was known by counsel, since it is not disclosed in the record and both trial attorneys are now deceased